United Nations AT/DEC/1151

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1151

Case No. 1260: GALINDO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr Mayer Gabay, Vice-President, presiding; Ms. Brigitte Stern; Ms. Jacqueline R. Scott;

Whereas, on 6 June 2002, Angelino Galindo, a staff member of the United Nations filed an Application, requesting the Tribunal, inter alia:

"2.1 To order the rescission of the decision of the Secretary-General dated 6 March 2002 to demote the Applicant to the P-3 level with no possibility of promotion and reassignment to an environment where he shall no longer exercise decision-making and managerial responsibilities;

2.2 To order the Respondent to place the Applicant on a P-4 post at the earliest opportunity. Until such post has been identified, the Applicant to be paid his salary and benefits at the appropriate P-4 level;

2.3 To order the Respondent to restore the Applicant to the position he would have been in had he not been demoted, by retroactively paying him the difference in salary and related allowances between his P-3 and P-4 levels, with the appropriate within-grade increments, from 15 March 2002 to the date of its Judgement;

2.4 To order that the Applicant's right to be considered for promotion and for posts where he can exercise decision-making and managerial responsibilities be restored;

2.5 To fix the amount of compensation to be paid to the Applicant for the injury sustained in the event that the Secretary-General, within 30 days of the notification of its Judgement, decides in the interest of the United Nations that the Applicant shall be compensated without further action being taken in his case;

2.6 To award the Applicant adequate and equitable compensation for the harm he sustained and the moral injury resulting from the consequences of the failure to afford him due process."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 December 2002 and thereafter until 14 January 2003;

Whereas the Respondent filed his Answer on 14 January 2003.

Whereas the Applicant filed Written Observations on 27 February 2003.

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 15 June 1976, as a Field Service Officer for the United Nations Interim Force in Lebanon (UNIFIL), at the FS-3 level, under a one-year fixed-term appointment, extended on a yearly basis until 1980. At the time of the events which gave rise to this Application, the Applicant was Chief, Personnel Unit, United Nations Conference on Trade and Development (UNCTAD).

On 10 April 2001, the Head of Office, United Nations Liaison Office (UNLO), Zagreb, requested the guidance of the Chief Administrative Officer, United Nations Mission in Bosnia and Herzegovina (UNMIBH/Sarajevo), concerning an "alleged theft involving a UN staff member from Geneva".

A preliminary investigation ensued, based upon an incident report, dated 10 April 2001, from a United Nations Security Section investigator. The report was compiled from information supplied by a PX Detective of the NATO Stabilization Force (SFOR) PX store in Zagreb, Security Officers of the International Military Police, as well as on statements made by the Applicant himself. The report in question provided in part as follows:

"On 9 April 2001, the staff member was observed on CCTV cameras, at the SFOR PX store in Zagreb, taking a toothpaste off the shelf, walking to an isolated area of the store, removing the toothpaste from the packet, putting the tube of toothpaste in his pocket, returning the empty toothpaste packet to the shelf, and then going to the cash register, where his wife paid for other items. He left the store without paying for the toothpaste that he had concealed in his pocket. As he left the PX store, he was approached by the PX Detective and asked to accompany her to the PX Security Office.

> The PX Detective and the SFOR Military Police questioned the staff member, and he admitted, orally and in writing, that he removed the tube of toothpaste from the PX store without paying for it ..."

On 17 April 2001, the Chief Administrative Officer, UNMIBH/Sarajevo, informed the Chief, Human Resources Management, UNOG, of the alleged involvement of the Applicant in the theft, and on 24 April 2001, a copy of the preliminary investigation report was sent to the Assistant Secretary-General for Human Resources Management.

On 30 April 2001, the Director, Specialist Services Division, OHRM, informed the Applicant of the allegations against him, and forwarded him a copy of the incident report, along with related documentation, as well as a copy of the 24 April memorandum. The Applicant was requested to submit his comments.

On 9 July 2001, the Assistant Secretary-General for Human Resources Management referred the case to the Joint Disciplinary Committee (JDC), Geneva, requesting the JDC to advise the Secretary-General as to possible disciplinary measures. The Applicant was notified on July 24 of the referral of his case to the JDC.

The JDC submitted its report on 14 January 2002. Its considerations, conclusoins and recommendations read, in part, as follows:

> "**Consideration of the charges and findings**
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> 50. The Panel firstly examined the charges of theft made again the staff member. The Panel recalled that the staff member admitted having stolen a tube of toothpaste from the PX Store in Zagreb on 9 April 2001 but declared that 'he is not aware of having been involved in an act of theft' on 10 March 2001. Having read the investigation reports including the various contradictory statements of the staff member, and viewed the videotape of the PX Store, the Panel was of the opinion that the staff member was clearly involved in the former incident, and most likely also in the latter.
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> 51. The Panel was of the opinion that the act of theft is reprehensible in itself and that the fact that the staff member had stolen once or twice was not so important. In the same spirit the Panel considered that the value of the stolen item was a subsidiary element repeating that what really matters is the theft *per se* and the prejudice caused to the Organization. The Panel indeed unanimously considered that the misconduct of which the staff member is accused tarnished and undermined the image of the United Nations and therefore constitutes an unquestionable prejudice to the Organization.

52. In addition, the Panel noted, in the course of the examination of the facts, that the staff member obtained a Ration Card from the PX Store upon presentation of his UN Laissez-Passer, while he was not performing official functions but was on a private trip. To hold such a Card he should have possessed an official UN Mission ID Card. The Panel also noted that the SFOR Ration Card he used had been issued in March 2000 and was expired.

...

54. The Panel discussed at length the argument of stress put forward by the staff member. Before taking any position on the matter, the Panel made it clear that if stress and emotional problems were to be recognized, these arguments would not exonerate the staff member from his responsibilities but could only constitute mitigating factors.

...

61. Consequently, all these related facts and the overall attitude of the staff member led the Panel to believe that the staff member knew quite well what he was doing, and that his responsibility could be fully engaged. Moreover, the Panel felt that concerning a number of issues, even minor ones, the staff member was deliberately misrepresenting facts.

62. Finally, given all these elements which are not strictly linked with the theft but which are telling about the overall attitude of the staff member, the Panel found that there was a lack of honesty and integrity of the staff member, aggravated by the staff member's official position as Chief of Personnel of UNCTAD.

Conclusions and recommendations

63. The Panel **concludes** that the staff member has failed to comply with his obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules, in particular its Regulation 1.2 concerning *basic rights and obligations of staff* and to observe the standards of conduct expected of an international civil servant.

64. The Panel **considers** that the following elements constituting misconduct are reunited in the present case:

a) There is evidence that the staff member committed unlawful acts (i.e. theft) in the sense of Paragraph 2 (b) of ST/AI/371;

b) There is evidence that the staff member abused the United Nations privileges and immunities in the sense of Paragraph 2 (f) of ST/AI/371 in using his UN Laissez-passer for private purposes;

c) There is evidence that the committed acts discredited the United Nations in the sense of Paragraph 2 (g) of ST/AI/371.

65. In view of the response of the staff member to the allegations made against him, the Panel **considers** that the explanation provided, i.e. a reaction to stress, does not waiver the staff member's liability and should therefore not be considered as a mitigating factor.

66. Therefore, the Panel **considers** that there is a blatant lack of integrity and that the staff member's position as Chief of Personnel of UNCTAD constitutes an aggravating factor.

67. In view of the above, the Panel **concludes** that the staff member has engaged in unsatisfactory conduct for which disciplinary measure may be imposed.

68. Therefore, the Panel **recommends** to the Secretary-General that the staff member be separated from service with compensation in lieu of notice on the grounds of serious misconduct incompatible with the basic requirements to be met by a United Nations staff member.

On 6 March 2002, the Under Secretary-General for Management transmitted a copy of the JDC report to the Applicant and informed him as follows:

> "The Secretary-General has given careful consideration to the findings of the Committee and has concluded that the charges that you committed theft and discredited the United Nations are well founded and that your conduct constituted a serious violation of the standards of conduct and integrity expected of each staff member of the Organization, aggravated by your official position as Chief of Personnel of UNCTAD. He has also considered the proportionality of the recommended disciplinary measure of separation from service to the misconduct of shoplifting a tube of toothpaste. Out of clemency and pursuant to his discretionary authority to impose appropriate disciplinary measures, the Secretary-General has decided that you be, instead, demoted to the P-3 level pursuant to Staff Rule 110.3(a) (vi), with effect from close of business on the day you receive this letter. Due to the nature and seriousness of your misconduct, your demotion will be with no possibility of promotion and would entail a reassignment to an environment where you shall no longer exercise decision-making and managerial responsibilities. ..."

On 6 June 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The report of the JDC does not provide a basis on which the Secretary-General could have reasonably placed reliance.

2. The facts on which the disciplinary measures were based have not been established.

3. The established facts do not legally amount to misconduct and are disproportionate and unfair.

4. The conclusions of the JDC are flawed, inconsistent and fall short of required standards of professionalism, fairness, and objectivity

5. The decision of the Secretary-General violates established policies of the UN as set forth in ST/IC/1999/111 with regard to the mental health of staff and is discriminatory and arbitrary.

6. The sanction is illegal since neither the ban on future promotions and exclusion from decision-making and managerial responsibilities are not among the disciplinary measures set forth in Staff Rule 110.3 and cannot be imposed without appropriate amendment.

Whereas the Respondent's principal contentions are:

1. The Secretary-General and the Executive Director of UNCTAD have broad discretion with regard to disciplinary matters, and this includes determination of what constitutes serious misconduct warranting summary dismissal. The decision to demote the Applicant was a valid exercise of that discretionary authority, and was not vitiated by substantive irregularity, procedural irregularity, improper motive, abuse of discretion or any other extraneous factors.

2. The Applicant was accorded due process.

3. The decision to, inter alia, demote the Applicant was not illegal or disproportionate.

4. The investigation into the allegations against the Applicant was not improperly motivated, nor was it tainted with bias or other extraneous factors.

The Tribunal, having deliberated from 30 October to 17 November 2003, now pronounces the following Judgement:

I. The Applicant is appealing the Respondent's decision to demote him to a P-3 level without possibility of promotion, for allegedly engaging in unlawful conduct and for abusing his privileges and obligations as a United Nations staff member. The Applicant claims that the Respondent's decision and the resulting sanctions imposed upon him were illegal, disproportionate to the offense, procedurally flawed, and in violation of his due process rights.

II. In June 1976, the Applicant joined the United Nations, as a Field Service Officer for UNIFIL, at the FS-3 level pursuant to a one year fixed-term appointment. In February 1981, the Applicant successfully passed the competitive examination for promotion to

the Professional category and in April 1982, was transferred to UNOG. In March 1985, the Applicant was granted a permanent appointment, and shortly thereafter, transferred to the Purchase, Transportation and Internal Services, as Chief of the Accounts and Inventories Unit.

From October 1992 until June 1997, the Applicant served as Officer-In-Charge of Personnel for UNCTAD. In 1998, he was promoted to P-4 level and made Chief of Personnel.

On 10 April 2001, the Head of Office, UNLO, Zagreb, notified the Chief Administrative Officer, UNMIBH/Sarajevo, of an alleged theft committed by the Applicant, described in a report of the same date from a United Nations Security Section investigator, which stated, inter alia, that:

> "on 9 April 2001, the staff member was observed on CCTV cameras, at the SFOR PX store in Zagreb, taking a tube of toothpaste off the shelf, walking to an isolated area of the store, removing the toothpaste from the packet, pocketing the toothpaste, returning the empty packet to the shelf, and then going to the cash register, where his wife paid for other items. He left the store without paying for the toothpaste concealed in his pocket. As he left the PX store, he was approached by the PX Detective and asked to accompany her to the PX Security Office.
>
> The PX Detective and the SFOR Military Police questioned the staff member, who admitted, orally and in writing, that he removed the tube of toothpaste from the PX store without paying for it.
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> According to the written statement of the PX Detective, the staff member admitted to her that he had in fact stolen two tubes of toothpaste, one on 10 March and one on 9 April 2001.
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> The Applicant denied being in Zagreb on 10 March 2001. Despite this statement, the PX CCTV tapes of 10 March 2001 confirmed that the staff member was present in the PX store on that date."

The case was referred to the JDC which, on 14 January 2002, unanimously concluded that the Applicant had failed to comply with his obligations under the Charter of the United Nations and the Staff Regulations and Rules. Finding sufficient evidence to support the charges, the JDC recommended that he be separated from service. On 6 March 2002, the Under-Secretary-General for Management informed the Applicant that out of clemency and in lieu of the proportionality of the recommended disciplinary measure of separation from service to the misconduct of shoplifting a tube of toothpaste, he would be demoted instead to a P-3 level with no possibility of promotion, and prohibited from employment in any position requiring decision-making or managerial responsibilities. On 6 June 2002, the Applicant appealed to the Tribunal.

III. The Respondent reminds the Tribunal that the Secretary-General is vested with broad discretion in relation to disciplinary matters, including determination of what actions constitute serious misconduct warranting summary dismissal. Thus, according to the Respondent, the decision to demote the Applicant constituted a valid exercise of those discretionary powers and was not vitiated by substantive irregularity, procedural irregularity, improper motive, abuse of discretion or any other extraneous factors.

While the choice of disciplinary measure to be imposed pursuant to Staff Regulation 10.2 falls within the Secretary-General's discretionary powers (see Judgment No. 941, *Kiwanuka* (1999)), the Tribunal is cognizant of the fact that, in the case of UNCTAD, this authority had been delegated to the Executive Director of UNCTAD.

IV. The explanation offered by the Applicant for his actions, was that he experienced a lapse in judgement as a result of mental problems attributable to cumulative stress and exhaustion. The Tribunal finds it difficult to believe that a long term seasoned employee holding a responsible and reasonably high level position would consciously endanger or destroy his career by engaging in so petty a crime as to steal an inexpensive tube of toothpaste, while at the same time paying for all the other more costly items in his shopping basket. The nature of the offense for which the Applicant had been punished, under these circumstances, would normally warrant little more than an admonition, a slap on the wrist or a referral for psychiatric assistance but certainly would call for the imposition of a much lighter penalty. It is therefore reasonable for the Tribunal to assume that the Applicant's bizarre behavior was engendered by some temporary mental lapse or aberration to which the Respondent overreacted by imposing an excessive and disproportionate penalty.

V. The Tribunal concurs with the Applicant's contention that the Respondent's discretionary authority must function within the requirements of due process. In this connection, the Applicant alleges that his due process rights were violated during the JDC proceedings, specifically when he was not allowed to rebut or comment on information requested and utilized by the JDC in its proceedings.

The Respondent however, claims that the Applicant was notified of the charges against him, provided reasonable opportunity to respond to those allegations, both in writing and orally before the JDC, informed of his rights to seek legal assistance and that there was no intent on behalf of the JDC to conceal any information from the

Applicant, specifically, the information from the Applicant's supervisor and the Joint Medical Service at UNOG. Although the Tribunal assiduously guards the Secretary-General's power to discipline staff, it has held consistently that the exercise of that power is not without limitation. Consequently, in disciplinary cases, the Tribunal may examine: (i) whether the facts on which the disciplinary measures were based have been established; (ii) whether the established facts legally amount to misconduct or serious misconduct; (iii) whether there has been any substantive irregularity (e.g., omission of facts or consideration of irrelevant facts); (iv) whether there has been any procedural irregularity; (v) whether there was an improper motive or abuse of purpose; (vi) whether the sanction is legal; (vii) whether the sanction imposed was disproportionate to the offence; (viii) and, as in the case of discretionary powers in general, whether there has been arbitrariness. (See Judgments No. 898, *Uggla* (1998), para. II; and, *Kiwanuka, ibid.*, para. III).)

VI. The Tribunal requires the Applicant to shoulder the burden of proving prejudice or other improper motives (see Judgments No. 834, *Kumar* (1997); and, No. 1122, *Lopes Braga* (2003)). The Applicant claims that the JDC violated his due process rights by failing to permit him the right to rebut and comment on information received by the JDC and which he specifically requested. The Tribunal agrees, and finds that the Applicant has met the requisite burden of proving that his due process rights were violated.

VII. In conclusion, the Tribunal finds that the Applicant's due process rights were violated when the JDC refused to afford the Applicant with the opportunity to respond to the information he requested and believes that the action taken against the Applicant was excessive under the circumstances and warrants reduction.

VIIII. For the foregoing reasons, the Tribunal:

1. Finds the penalty of demotion with no possibility of promotion and prohibition from employment in any position requiring decision-making or managerial responsibilities disproportionate to the offense;
2. Orders that the Applicant be granted priority consideration for any position at the level for which he applies and for which he is qualified;
3. Orders that the Applicant be given as compensation, on a monthly basis, an amount equivalent to the difference in remuneration he receives at his present grade and the remuneration he would have

received at the level he held prior to his demotion, starting on the date of the circulation of this judgement until such time as he is promoted;

4. Rejects all other pleas.

(*Signatures*)

Mayer **Gabay**
Vice-President, presiding

Brigitte **Stern**
Member

Jacqueline R. **Scott**
Member

New York, 17 November 2003

Maritza **Struyvenberg**
Executive Secretary